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Preparatory Commission for the International Criminal Court

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## Report of the Preparatory Commission for the International Criminal Court (continued)

**Addendum**

# Part II
# Proposals for a provision on the crime of aggression*

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* See also paragraphs 8 and 9 of the present report (PCNICC/2002/2).

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# Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression

*The Assembly of States Parties*,

*Recalling* paragraph 2 of article 5 of the Rome Statute,

*Recalling also* paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

*Desirous* of continuing and completing the work on the crime of aggression,

1. *Takes note with appreciation* of the report of the Preparatory Commission for the International Criminal Court on the crime of aggression;[1]

2. *Decides* to establish a special working group on the crime of aggression, open on an equal footing to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, for the purpose of elaborating proposals for a provision on aggression in accordance with paragraph 2 of article 5 of the Statute and paragraph 7 of resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998;

3. *Decides also* that the special working group shall submit such proposals to the Assembly for its consideration at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute in accordance with the relevant provisions of the Statute;

4. *Decides further* that the special working group shall meet during the regular sessions of the Assembly or at any other time that the Assembly deems appropriate and feasible;

5. *Requests* the Bureau of the Assembly to prepare a proposal for the meetings of the special working group and to submit the proposal, with its budgetary implications, at the earliest possible session with a view to holding the first meeting of the special working group in 2003.

[1] PCNICC/2002/2/Add.2.

# Discussion paper proposed by the Coordinator

## I. Definition of the crime of aggression and conditions for the exercise of jurisdiction

1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

**Option 1**: Add "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

**Option 2**: Add "and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

**Option 3**: Neither of the above.

2. For the purpose of paragraph 1, "act of aggression" means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,

**Option 1**: Add "in accordance with paragraphs 4 and 5".

**Option 2**: Add "subject to a prior determination by the Security Council of the United Nations".

3. The provisions of articles 25, paragraphs 3, 28 and 33 of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate:

**Option 1**: under Article 39 of the Charter of the United Nations.

**Option 2**: in accordance with the relevant provisions of the Charter of the United Nations.

5. Where the Security Council does not make a determination as to the existence of an act of aggression by a State:

*Variant (a)* or invoke article 16 of the Statute within six months from the date of notification.

*Variant (b)* [Remove variant a.]

**Option 1**: the Court may proceed with the case.

**Option 2**: the Court shall dismiss the case.

**Option 3**: the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation within [12] months. In the absence of such a recommendation, the Court may proceed with the case.

**Option 4**: the Court may request

*Variant (a)* the General Assembly

*Variant (b)* the Security Council, acting on the vote of any nine members,

to seek an advisory opinion from the International Court of Justice, in accordance with Article 96 of the Charter and Article 65 of the Statute of the International Court, on the legal question of whether or not an act of aggression has been committed by the State concerned. The Court may proceed with the case if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.

**Option 5**: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

## II. Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court)[2]

**Precondition**

In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition that an appropriate organ[3] has determined the existence of the act of aggression required by element 5 of the following Elements.

**Elements**

1: The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression as defined in element 5 of these Elements.

2: The perpetrator was knowingly in that position.

3: The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.

4: The perpetrator committed element 3 with intent and knowledge.

5: An "act of aggression", that is to say, an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, was committed by a State.

6: The perpetrator knew that the actions of the State amounted to an act of aggression.

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[2] The elements in part II are drawn from a proposal by Samoa and were not thoroughly discussed.

[3] See options 1 and 2 of paragraph 2 of part I. The right of the accused should be considered in connection with this precondition.

7: The act of aggression, by its character, gravity and scale, constituted a flagrant violation of the Charter of the United Nations,

**Option 1**: Add "such as a war of aggression or an aggression which had the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof".

**Option 2**: Add "and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

**Option 3**: Neither of the above.

8: The perpetrator had intent and knowledge with respect to element 7.

**Note**:

Elements 2, 4, 6 and 8 are included out of an abundance of caution. The "default rule" of article 30 of the Statute would supply them if nothing were said. The dogmatic requirement of some legal systems that there be both intent and knowledge is not meaningful in other systems. The drafting reflects these, perhaps insoluble, tensions.

# List of documents on the crime of aggression

[Original: Arabic/English/French/Spanish]

## General documents relating to the crime of aggression

*First session of the Preparatory Commission (16-26 February 1999)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/1999/DP.11 | Proposal submitted by Bahrain, Iraq, Lebanon, the Libyan Arab Jamahiriya, Oman, the Sudan, the Syrian Arab Republic and Yemen on the crime of aggression |

*Second session of the Preparatory Commission (26 July-13 August 1999)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/1999/DP.12 | Proposal submitted by the Russian Federation: definition of the crime of aggression |
| PCNICC/1999/DP.13 | Proposal submitted by Germany: definition of the crime of aggression |
| PCNICC/1999/INF/2 | Compilation of proposals on the crime of aggression submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999) |
| PCNICC/1999/INF/2/Add.1 | Addendum |

*Third session of the Preparatory Commission (29 November-17 December 1999)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/1999/L.5/Rev.1 | Proceedings of the Preparatory Commission at its first, second and third sessions (16-26 February, 26 July-13 August and 29 November-17 December 1999) (summary), annex IV |

*Fourth session of the Preparatory Commission (13-31 March 2000)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2000/L.1/Rev.1 | Proceedings of the Preparatory Commission at its fourth session (13-31 March 2000) (summary), annex IV |

*Fifth session of the Preparatory Commission (12-30 June 2000)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2000/L.3/Rev.1 | Proceedings of the Preparatory Commission at its fifth session (summary), annex II |

*Sixth session of the Preparatory Commission (27 November-8 December 2000)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2000/L.4/Rev.1 | Proceedings of the Preparatory Commission at its sixth session (27 November-8 December 2000) (summary), annex V |

*Seventh session of the Preparatory Commission (26 February-9 March 2001)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2001/L.1/Rev.1 | Proceedings of the Preparatory Commission at its seventh session (26 February-9 March 2001) (summary), annex V |

*Eighth session of the Preparatory Commission (24 September-5 October 2001)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2001/L.3/Rev.1 | Proceedings of the Preparatory Commission at its eighth session (24 September-5 October 2001) (summary), annex III |

*Ninth session of the Preparatory Commission (8-19 April 2002)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2002/L.1/Rev.1 | Proceedings of the Preparatory Commission at its ninth session (8-19 April 2002) (summary), annex IV |

*Tenth session of the Preparatory Commission (1-12 July 2002)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2002/L.4/Rev.1 | Proceedings of the Preparatory Commission at its tenth session (1-12 July 2002) (summary) |
| PCNICC/2002/2/Add.2 | Report of the Preparatory Commission for the International Criminal Court, part II |

## Working Group on the Crime of Aggression[4]

*Third session of the Preparatory Commission (29 November-17 December 1999)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/1999/WGCA/DP.1 | Proposal submitted by Greece and Portugal |
| PCNICC/1999/WGCA/RT.1 | Discussion paper proposed by the Coordinator: consolidated text of proposals on the crime of aggression |
| PCNICC/1999/WGCA/RT.1/Corr.1 | Corrigendum |
| PCNICC/1999/WGCA/RT.1/Corr.2 | Corrigendum (French only) |

[4] No documents were issued under this heading during the first and second sessions of the Preparatory Commission.

*Fourth session of the Preparatory Commission (13-31 March 2000)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2000/WGCA/DP.1 | Proposal submitted by Colombia on the definition of the crime of aggression and on conditions for the exercise of the jurisdiction of the Court with regard to this crime |
| PCNICC/2000/WGCA/DP.1/Add.1 | Addendum |
| PCNICC/2000/WGCA/DP.2 | Proposal submitted by Colombia on the Italian proposal made orally in the Working Group on 13 March 2000 |
| PCNICC/2000/WGCA/DP.3 | Suggestions made orally by Italy on 13 March 2000 with regard to a structure for discussion on the crime of aggression |
| PCNICC/2000/WGCA/RT.1 | Discussion paper proposed by the Coordinator: preliminary list of possible issues relating to the crime of aggression |

*Fifth session of the Preparatory Commission (12-30 June 2000)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2000/WGCA/INF/1 | Reference document on the crime of aggression, prepared by the Secretariat |

*Sixth session of the Preparatory Commission (27 November-8 December 2000)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2000/WGCA/DP.4 | Proposal submitted by Germany: the crime of aggression — a further informal discussion paper |
| PCNICC/2000/WGCA/DP.5 | Proposal submitted by Greece and Portugal |

*Seventh session of the Preparatory Commission (26 February-9 March 2001)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2001/WGCA/DP.1 | Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania |

*Eighth session of the Preparatory Commission (24 September-5 October 2001)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2001/WGCA/DP.2 | Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania: definition of the crime of aggression |
| PCNICC/2001/WGCA/DP.2/Add.1 | Addendum — Conditions for exercise of jurisdiction over the crime of aggression |
| PCNICC/2001/WGCA/DP.3 | Proposal submitted by Guatemala on document PCNICC/2001/WGCA/DP.2 |

*Ninth session of the Preparatory Commission (8-19 April 2002)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2002/WGCA/L.1 | Historical review of developments relating to aggression, prepared by the Secretariat |
| PCNICC/2002/WGCA/L.1/Add.1 | Addendum |
| PCNICC/2002/WGCA/DP.1 | Proposal by the Netherlands concerning PCNICC/2002/WGCA/RT.1 |
| PCNICC/2002/WGCA/RT.1 | Definition of the crime of aggression and conditions for the exercise of jurisdiction: Discussion paper proposed by the Coordinator |

*Tenth session of the Preparatory Commission (1-12 July 2002)*

| *Symbol* | *Description* |
|---|---|
| PCNICC/2002/WGCA/L.2 | Draft report of the Working Group — Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression |
| PCNICC/2002/WGCA/L.2/Rev. 1 | Draft report of the Working Group — Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression |
| PCNICC/2002/WGCA/DP.2 | Elements of the Crime of Aggression — Proposal submitted by Samoa |
| PCNICC/2002/WGCA/DP.3 | Proposed text on the definition of the crime and act of aggression — Proposal submitted by the delegation of Colombia |
| PCNICC/2002/WGCA/DP.4 | Draft resolution of the continuity of work in respect of the crime of aggression — Proposal by the Movement of Non-Aligned Countries |
| PCNICC/2002/WGCA/DP.5 | Incorporating the crime of aggression as a leadership crime into the definition — Proposal submitted by Belgium, Cambodia, Sierra Leone and Thailand |
| PCNICC/2002/WGCA/RT.1/Rev.1 | Discussion paper proposed by the Coordinator |
| PCNICC/2002/WGCA/RT.1/Rev.2 | Discussion paper proposed by the Coordinator |

## Historical review of developments relating to aggression, prepared by the Secretariat

[*See PCNICC/2002/WGCA/L.1 and Add.1*]